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GIGANEWS, INC., and
9 LIVEWIRE SERVICES, INC.

10
11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION
14

15 PERFECT 10, INC., a California
16 corporation,

17 Plaintiff,

18 v.

19 GIGANEWS, INC., a Texas Corporation;
20 LIVEWIRE SERVICES, INC., a Nevada
21 corporation; and DOES 1 through 100,
inclusive,

22 Defendants.
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27
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Case No.: 11-cv-07098-ABC (SHx)

**DEFENDANTS GIGANEWS,
INC. AND LIVEWIRE
SERVICES, INC.'S ANSWER TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

**GIGANEWS, INC. AND LIVEWIRE SERVICES, INC.’S ANSWER TO
PERFECT 10’S FIRST AMENDED COMPLAINT FOR COPYRIGHT
INFRINGEMENT**

Defendants Giganews, Inc. (“Giganews”) and Livewire Services, Inc. (“Livewire”) (collectively “Defendants”) respond to Plaintiff Perfect 10, Inc.’s First Amended Complaint as follows.

1. Defendants admit the allegations of paragraph 1 of the First Amended Complaint.

2. Defendants admit the allegations of paragraph 2 of the First Amended Complaint.

3. Defendants deny the allegations of paragraph 3 of the First Amended Complaint.

4. Defendants deny that PERFECT 10 magazine was ever popular. Defendants lack information or belief sufficient to admit or deny the remaining allegations of paragraph 4 of the First Amended Complaint and therefore deny the allegations.

5. Defendants deny the allegations of paragraph 5 of the First Amended Complaint.

6. Livewire admits that it at some time operated the Internet websites located at rhinonewsgroups.com, cheapnewsgroups.com, fastusenet.com, usenetgiant.com, and usenet.net. Livewire admits that some of these websites are no longer operational, and that Livewire still operates rhinonewsgroups.com, powerusenet.com, and usenet.net. None of these websites has ever had any images in which Perfect 10 has alleged it owns the copyright. Defendants deny the remaining allegations of paragraph 6 of the First Amended Complaint.

7. Defendants admit that Ronald Yokubaitis and members of his family own and control Giganews and Livewire. Defendants deny the remaining allegations of paragraph 7 of the First Amended Complaint.

1 8. Defendants deny the allegations of paragraph 8 of the First Amended
2 Complaint.

3 9. Defendants deny the allegations of paragraph 9 of the First Amended
4 Complaint.

5 10. Defendants deny they acted with any Doe Defendants to harm or
6 damage Perfect 10 as it alleges. Defendants lack information or belief sufficient to
7 admit or deny the remaining allegations of paragraph 10 of the First Amended
8 Complaint and therefore deny the allegations.

9 11. Defendants deny the allegations of paragraph 11 of the First Amended
10 Complaint.

11 12. Defendants deny the allegations of paragraph 12 of the First Amended
12 Complaint.

13 13. Defendants deny the allegations of paragraph 13 of the First Amended
14 Complaint. Defendants believe that the business of Perfect 10 consists of copyright
15 litigation for purposes of settlement revenue.

16 14. Defendants deny the allegations of paragraph 14 of the First Amended
17 Complaint.

18 15. Defendants deny the allegations of paragraph 15 of the First Amended
19 Complaint.

20 16. Defendants lack information or belief sufficient to admit or deny the
21 allegations of paragraph 16 of the First Amended Complaint and therefore deny the
22 allegations.

23 17. Defendants deny that Perfect 10's revenues are currently derived
24 predominately from sales of memberships to its perfect10.com website. Defendants
25 believe that Perfect 10's revenues almost exclusively derive from litigation
26 settlements. Defendants lack information or belief sufficient to admit or deny the
27 remaining allegations of paragraph 17 of the First Amended Complaint and
28 therefore deny the allegations.

1 18. Defendants deny that Exhibits 4-6 include Perfect 10 copyrighted
2 images that Defendants have infringed. Defendants deny that Perfect 10 continues
3 to invest substantial sums of money, time, effort, and creative talent to make and
4 produce Perfect 10 copyrighted works. Defendants lack information or belief
5 sufficient to admit or deny the remaining allegations of paragraph 18 of the First
6 Amended Complaint and therefore deny the allegations.

7 19. Defendants deny that Perfect 10 owns a valuable and well-known
8 Perfect 10 family of trademarks. Defendants further deny that Perfect 10 uses such
9 marks in commerce or in connection with the sale of certain products including
10 Perfect 10 Magazine. Defendants lack information or belief sufficient to admit or
11 deny the remaining allegations of paragraph 19 of the First Amended Complaint
12 and therefore deny the allegations.

13 20. Defendants lack information or belief sufficient to admit or deny the
14 allegations of paragraph 20 of the First Amended Complaint and therefore deny the
15 allegations.

16 21. Defendants deny that Perfect 10 secures valid assignments of its
17 models' rights of publicity and that the so-called Perfect 10 Rights of Publicity are
18 valuable. Defendants lack information or belief sufficient to admit or deny the
19 allegations of paragraph 21 of the First Amended Complaint and therefore deny the
20 allegations.

21 22. Defendants deny infringement and deny that any infringement as
22 Plaintiff describes is devastating to or threatens the existence of Perfect 10's
23 business. Defendants lack information or belief sufficient to admit or deny the
24 remaining allegations of paragraph 22 of the First Amended Complaint and
25 therefore deny the allegations.

26 23. Giganews admits that it operates the Internet website located at
27 giganews.com. Livewire admits that it operates or has operated the Internet
28 websites located at rhinonewsgroups.com, powerusernet.com, infinityusernet.com,

1 eurousenet.com, galacticegroups.com, cheapnewsgroups.com, fastusenet.com,
2 usenetgiant.com, and usenet.net, but at no time have those websites had images in
3 which Perfect 10 claims copyright rights. Defendants admit that the Yokubaitis
4 family owns or controls both Giganews and Livewire. Defendants deny the
5 remaining allegations of paragraph 23 of the First Amended Complaint.

6 24. Defendants deny the allegations of paragraph 24 of the First Amended
7 Complaint.

8 25. Giganews admits that it has in the past and continues to provide
9 Usenet access services to some of the largest and most prestigious Internet service
10 providers in the world, which have provided Giganews's Usenet access services to
11 over 10 million households since Giganews began its services. Defendants deny
12 the remaining allegations of paragraph 25 of the First Amended Complaint.

13 26. Defendants deny the allegations of paragraph 26 of the First Amended
14 Complaint.

15 27. Giganews admits that, in connection with certain subscriptions, it
16 furnishes customers a username and password. Defendants deny the remaining
17 allegations of paragraph 27 of the First Amended Complaint.

18 28. Defendants deny the allegations of paragraph 28 of the First Amended
19 Complaint.

20 29. Defendants deny the allegations of paragraph 29 of the First Amended
21 Complaint.

22 30. Defendants admit that, in the Mimo browser, search results contain a
23 field called "poster" that provides a reference to a person ostensibly contributing a
24 message to the Usenet and a field called "age" that refers to how long Giganews's
25 Usenet servers have stored a Usenet message. Defendants lack information or
26 belief sufficient to admit or deny the allegations regarding specific articles that
27 Plaintiff refers to in paragraph 30. Defendants deny the remaining allegations of
28 paragraph 30 of the First Amended Complaint and therefore deny the allegations.

1 31. Defendants lack information or belief sufficient to admit or deny the
2 allegations regarding Exhibit 3 and therefore deny those allegations. Defendants
3 deny the remaining allegations of paragraph 31 of the First Amended Complaint.

4 32. Giganews admits it provides its customers access to the Usenet, but it
5 does not “allow” or “forbid” what its customers (or customers of its customers)
6 may choose to download. Defendants deny that they offer the images in Exhibit 4
7 to users. Defendants lack information or belief sufficient to admit or deny the
8 remaining allegations of paragraph 32 of the First Amended Complaint and
9 therefore deny the allegations.

10 33. Giganews admits that it offers a newsreader called Mimo as part of its
11 services to its Diamond members, and that the retail price of a Diamond
12 membership is \$34.99/month. Defendants deny the remaining allegations of
13 paragraph 33 of the First Amended Complaint.

14 34. Defendants deny the allegations of paragraph 34 of the First Amended
15 Complaint.

16 35. Defendants deny the allegations of paragraph 35 of the First Amended
17 Complaint.

18 36. Defendants deny the allegations of paragraph 36 of the First Amended
19 Complaint.

20 37. Defendants deny the allegations of paragraph 37 of the First Amended
21 Complaint.

22 38. Defendants deny the allegations of paragraph 38 of the First Amended
23 Complaint.

24 39. Defendants deny the allegations of paragraph 39 of the First Amended
25 Complaint.

26 40. Defendants deny the allegations of paragraph 40 of the First Amended
27 Complaint
28

1 41. Defendants deny that Giganews offers Perfect 10 magazines.
2 Defendants lack information or belief sufficient to admit or deny the remaining
3 allegations of paragraph 41 of the First Amended Complaint and therefore deny the
4 allegations.

5 42. Defendants deny that uploading movies to the Usenet would always
6 subject the uploader to severe penalties for criminal copyright infringement; for
7 example, an uploader who is the copyright owner or who has legal authorization or
8 justification to make the upload would not be subject to any penalties. Defendants
9 lack information or belief sufficient to admit or deny the remaining allegations of
10 paragraph 42 of the First Amended Complaint and therefore deny the allegations.

11 43. Defendants deny all allegations regarding Giganews in paragraph 43.
12 Defendants lack information or belief sufficient to admit or deny the remaining
13 allegations of paragraph 43 of the First Amended Complaint and therefore deny the
14 allegations.

15 44. Defendants deny the allegations of paragraph 44 of the First Amended
16 Complaint.

17 45. Giganews admits that in March 2009, it received, addressed to “To
18 Whomever It May Concern” at “Giganews,” a letter dated March 25, 2009 from
19 Perfect 10. Giganews admits that it wrote back to Perfect 10 explaining that Perfect
20 10’s letter did not provide the Message IDs necessary for Giganews to identify any
21 allegedly infringing images that Perfect 10’s letter referred to and explaining to
22 Perfect 10 how to locate and provide the Message IDs. Defendants deny the
23 remaining allegations of paragraph 45 of the First Amended Complaint.

24 46. Defendants deny the allegations of paragraph 46 of the First Amended
25 Complaint.

26 47. Defendants deny the allegations of paragraph 47 of the First Amended
27 Complaint.
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1 48. Defendants lack sufficient information or belief regarding the specific
2 contents of Plaintiff's communications with Visa to admit or deny these allegations
3 and therefore deny them. Defendants deny the remaining allegations of paragraph
4 48 of the First Amended Complaint.

5 49. Defendants lack information or belief sufficient to admit or deny the
6 allegations of paragraph 49 of the First Amended Complaint and therefore deny the
7 allegations.

8 50. Defendants lack information or belief sufficient to admit or deny
9 whether Exhibit 6 includes images of the faces of Christina Aguilera, Bridget
10 Fonda, Halle Berry, Jennifer Lopez, Kate Beckinsale, Katie Holmes, and Natalie
11 Portman superimposed on portions of images copyrighted by Perfect 10, and
12 therefore deny this allegation. Defendants deny the remaining allegations of
13 paragraph 50 of the First Amended Complaint.

14 51. Defendants deny the allegations of paragraph 51 of the First Amended
15 Complaint.

16 52. Defendants deny the allegations of paragraph 52 of the First Amended
17 Complaint.

18 53. Defendants deny the allegations of paragraph 53 of the First Amended
19 Complaint.

20 54. Defendants lack information or belief sufficient to admit or deny
21 whether or how many images associated with messages found on the newsgroups
22 alt.binaries.celeb.fake and alt.binaries.pictures.nude.celebrities.fake use a "Perfect
23 10 image" for the purported body of a celebrity and whether any such images
24 infringe upon Perfect 10's copyrights, and they therefore deny those allegations.
25 Defendants deny the remaining allegations of paragraph 54 of the First Amended
26 Complaint.

27 55. Defendants lack information or belief sufficient to admit or deny the
28 allegations regarding the numbers or character of articles or messages on April 20,

1 2011. Defendants deny the remaining allegations of paragraph 55 of the First
2 Amended Complaint.

3 56. Defendants deny the allegations of paragraph 56 of the First Amended
4 Complaint.

5 57. Defendants deny the allegations of paragraph 57 of the First Amended
6 Complaint.

7 58. Defendants deny the allegations of paragraph 58 of the First Amended
8 Complaint.

9 59. Livewire admits that it operates or has operated the Internet websites
10 located at rhinonewsgroups.com, powerusenet.com, infinityusenet.com,
11 eurousenet.com, galacticegroups.com, cheapnewsgroups.com, fastusenet.com,
12 usenetgiant.com, and usenet.net. None of these websites has ever had any images
13 in which Perfect 10 has alleged it owns the copyright. Defendants admit that the
14 Yokubaitis family owns or controls both Giganews and Livewire. Defendants deny
15 the remaining allegations of paragraph 59 of the First Amended Complaint.

16 60. Defendants admit that Ronald Yokubaitis is the currently listed
17 Designated Agent to Receive Notification of Claimed Infringement with the U.S.
18 Copyright Office for Livewire, and that Mr. Yokubaitis is also the currently listed
19 Designated Agent to Receive Notification of Claimed Infringement with the U.S.
20 Copyright Office for Giganews. Defendants deny the remaining allegations of
21 paragraph 60 of the First Amended Complaint.

22 61. Defendants deny the allegations of paragraph 61 of the First Amended
23 Complaint.

24 62. Defendants deny the allegations of paragraph 62 of the First Amended
25 Complaint.

26 63. Defendants deny the allegations of paragraph 63 of the First Amended
27 Complaint.

28

64. Defendants deny the allegations of paragraph 64 of the First Amended Complaint.

FIRST CLAIM

1 77. Defendants deny the allegations of paragraph 77 of the First Amended
2 Complaint.

3 78. Defendants deny the allegations of paragraph 78 of the First Amended
4 Complaint.

5 79. Defendants deny the allegations of paragraph 79 of the First Amended
6 Complaint.

7 80. Defendants deny the allegations of paragraph 80 of the First Amended
8 Complaint.

9 81. Defendants deny the allegations of paragraph 81 of the First Amended
10 Complaint.

11 82. Defendants deny the allegations of paragraph 82 of the First Amended
12 Complaint.

AFFIRMATIVE AND OTHER DEFENSES

14 Defendants assert the following defenses, whether affirmative or otherwise.
15 Defendants reserve all further defenses that may now or in the future exist based on
16 discovery and further factual investigation in the case.

- 17 1. The First Amended Complaint and each claim within it fail to allege
18 facts sufficient to state a cause of action.
- 19 2. The lack of any volitional action by Defendants relating to
20 infringement bars liability of Defendants.
- 21 3. Defendants' lack of culpable intent regarding alleged underlying
22 infringements bars the claims against Defendants.
- 23 4. Defendants' lack of specific knowledge of alleged underlying
24 infringements bars the claims against Defendants.
- 25 5. Defendants' lack of any *respondeat superior* relationship with any
26 alleged infringers bars vicarious liability of Defendants.
- 27 6. Defendants' lack of direct financial profit from the alleged underlying
28 infringements bars the claims against Defendants.

7. The fair use doctrine bars Plaintiff's claims.
8. The doctrine of unclean hands bars Plaintiff's claims.
9. The doctrine of copyright misuse bars Plaintiff's claims.
10. Plaintiff's failure to mitigate damages bars Plaintiff's claims.
11. Waiver and estoppel bar Plaintiff's claims.
12. Lack of ownership of the alleged copyrights bars Plaintiff's claims with respect to any copyrights that Perfect 10 does not own.
13. The safe harbors under 17 U.S.C. § 512 bar the relief against Defendants that the Plaintiff seeks.
14. To the extent that Plaintiff or its predecessors did not register copyrights before alleged infringements or within three months of first publication of published works, the failure to register timely bars Plaintiff's claims for statutory damages and attorney's fees.
15. To the extent that Plaintiff or its predecessors did not register copyrights before alleged infringements of unpublished works, the failure to register timely bars Plaintiff's claims for statutory damages and attorney's fees.
16. Plaintiff's claims for statutory damages violate the First, Fifth, and Eighth Amendments to the United States Constitution.
17. The lack of statutory causes of action for contributory infringement and vicarious liability bars Plaintiff's claim for statutory damages for those alleged causes of action.
18. The Court lacks jurisdiction to adjudicate claims of infringement of copyrights for which Perfect 10 does not own a registration, and this case is not yet ripe for adjudication of infringements of copyrights for which Perfect 10 does not own a registration.

PRAYER FOR RELIEF

Defendants respectfully request that the Court enter judgment in favor of Defendants that Plaintiff take nothing by its claims against Defendants; award

1 Defendants their attorneys' fees and costs pursuant to the Copyright Act in
2 connection with this action; and grant all other relief as this Court deems proper.

3 **DEMAND FOR JURY TRIAL**

4 Defendants request trial by jury.

5 Dated: July 24, 2013

FENWICK & WEST LLP

6
7 By: /s/ Andrew P. Bridges

8 Andrew P. Bridges

Jennifer L. Kelly

Kathleen Lu

9 Attorneys for Defendants

10 GIGANEWS, INC.,

11 LIVEWIRE SERVICES, INC.

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